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In The

Supreme Court of the United States

JOYCE LIVESTOCK COMPANY &
LU RANCHING COMPANY,

Joint Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

REPLY BRIEF

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ARGUMENT

I. This Court Should Grant Certiorari Because The United States Previously Argued That This EAJA Issue Will Recur, A Clear Conflict Exists, And The Joyce Livestock And LU Ranching Cases Present An Excellent Opportunity For This Court To Resolve This EAJA Issue.

a. The United States Acknowledged In Its Idaho Supreme Court Briefing That This EAJA Issue Is Important And Will Recur.

In its opposition brief, the United States argues that this EAJA jurisdictional issue "has not occurred with sufficient frequency to call for this Court's review." Opp. 7. Yet, in its briefing before the Idaho Supreme Court the United States argued the opposite – that EAJA attorney fees issue could arise in "hundreds of thousands" of water claims in Western water adjudications in which the United States is involved, potentially causing considerable cost to the federal government in awarding attorney fees. The United States argued below:

> In light of the United States' participation in general stream adjudications across the Western United States with *hundreds of thousands of water claims at issue*, the potential cost to the public for attorneys' fees awards would be considerable and, thus, the [Congressional Budget Office's] omission of such costs from its estimate for EAJA

> reinforces the inference that Congress never intended EAJA to apply to such proceedings.

Brief for the United States as Respondent, *Joyce Livestock Company v. United States*, No. 32846, p. 12 (Idaho Supreme Court, October 12, 2006) (emphasis added).

The United States should be judicially estopped to argue here that the issue is not important and will not recur. While its legal argument that the EAJA does not apply to state water adjudications is misplaced, the United States' Idaho Supreme Court argument that state court awards of EAJA attorney fees could occur and recur and would be detrimental to the federal fisc underscores the importance of this Court's ruling on this issue. Without a Court decision reversing the Idaho Supreme Court's ruling, private litigants will have their will and financial resources exhausted in their fight for water rights. The Idaho Supreme Court decision will affect many others beyond the litigants in this case.

b. EAJA Amendments Do Not Dilute The Direct Conflict Between The Idaho And Nevada Supreme Courts Regarding EAJA Jurisdiction.

Joyce Livestock and LU Ranching and the Nevada Supreme Court decision in *Hood* are in direct conflict because the cases apply and interpret identical EAJA language and come to opposite conclusions about the jurisdictional effect of that language on the

statute as a whole. *Joyce*, App. 32-33, 34; *Hood*, App. 254. Despite the representations of the United States, amendments to the EAJA that occurred after *Hood* do not change the conflicting analysis regarding the "any court having jurisdiction" language that the Idaho and Nevada Supreme Courts applied, or the effect of that language on the EAJA, as demonstrated below.[1] Opp. 7, 14, 15.

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[1] Indeed, Congress amended the EAJA seven times after it enacted the EAJA in 1980, and six of these amendments occurred after the Nevada Supreme Court's *Hood* decision. *See* Pub. L. 97-248, Title II, § 292(c), 96 Stat. 574 (Sept. 3, 1982); Pub. L. 99-88, §§ 2, 6(a), (b)(2), 99 Stat. 184, 186 (Aug. 5, 1985); Pub. L. 99-514, § 2, 100 Stat. 2095 (Oct. 22, 1986); Pub. L. 102-572, Title III, § 301(a), Title V, §§ 502(b), 506(a), Title IX, § 902(b)(1), 106 Stat. 4511-4513, 4516 (Oct. 29, 1992); Pub. L. 104-66, Title I, § 1091(b) 109 Stat. 722 (Dec. 21, 1995); Pub. L. 104-121, Title II, § 232, 110 Stat. 863 (Mar. 29, 1996); Pub. L. 105-368, Title V, § 512(b)(1)(B), 112 Stat. 3342 (Nov. 11, 1998).

If, as the United States argues, Congress intended the EAJA to apply solely to actions in federal courts, Congress could have expressly stated as much, especially in light of *Hood*. Congress did not disapprove *Hood*, or limit EAJA jurisdiction to federal courts in any of the *six amendments* to the EAJA following *Hood*, while Congress did ratify and reject other cases interpreting the EAJA in amendments to the statute in EAJA amendments. H.R. Rep. No. 120(I), 99th Cong., at 13, 17 (1985), reprinted in 1985 U.S.C.C.A.N. 132.

"[S]ubsection (d) of 28 U.S.C. § 2412 ... provides ... "a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... brought by or against the United States in **any court having jurisdiction** of that action..." **If Congress had intended that state courts also be included, it certainly would also have included a specific reference to them.** We therefore hold that 28 U.S.C. § 2412(d) does not authorize state courts to award attorney fees against the United States."

See Joyce, App. 32-33, 34 (emphasis added).

"28 U.S.C. § 2412(a) specifically provides that "any court having jurisdiction of such action" brought by or against the United States, may award costs as enumerated in 28 U.S.C. § 1920. 28 U.S.C. § 2412(b) clearly provides that "any court having jurisdiction of such action" may award reasonable attorney fees and expenses to the prevailing party in any civil action brought by or against the United States. As stated earlier, **section 2410 clearly gives the state court, being an appropriate forum, jurisdiction to entertain the quiet title action. Hence, the state court must necessarily be included within the language of "*any* court having jurisdiction.""**

See Hood, App. 254 (emphasis added).

In each case, the respective state supreme courts analyzed the meaning of "any court having jurisdiction," a phrase Congress uses repeatedly and continuously throughout successive amendments to the statute to indicate courts that may award EAJA attorney fees against the United States. As Amici emphasize, at least twenty-eight other federal statutes apply and use the phrase "any court having jurisdiction." Amici Curiae Brief, 9. Congress' amendments to the statute do not change the import or effect of these two state supreme court's conflicting rulings.

c. The Joyce Livestock And LU Ranching Cases Present An Excellent Opportunity For This Court To Resolve This EAJA Issue Because Petitioners Are Entitled To EAJA Fees If The EAJA Applies In State Courts.

This case is the appropriate vehicle for this Court to determine if the EAJA applies in state court because, contrary to the United States' arguments, if the EAJA does apply, Petitioners are entitled to EAJA attorney fees.[2] Opp. 15-16. The Idaho Supreme Court

[2] The United States also suggests that final judgment rule, 28 U.S.C. § 1257, also precludes this Court's review of the Idaho Supreme Court's decision. Opp. 7-8. This Court considers final, for appeal purposes, state court decisions on federal issues that require a decision regardless of anticipated state proceedings in the same matter. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 480-481 (1975) (citing *Radio Station WOW v. Johnson*, 326

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did not reach the issue of the United States' substantial justification in pursuing its water rights claims against Joyce Livestock and LU Ranching. *Joyce*, App. 32-34. And the district court's denial of attorney fees on the grounds that the United States' litigation position was substantially justified was an abuse of discretion. The district court applied the Idaho state law "frivolous and unreasonable" standard for state attorney fee awards to make its substantial justification EAJA finding under federal law and based its attorney fee findings on the ground that the United States raised one novel legal issue, hardly the EAJA substantial justification standard this Court mandates. *Joyce Livestock Memorandum Decision and Order Regarding Attorneys' Fees,* App. 62-65, 66; *Pierce v. Underwood*, 487 U.S. 552, 564-566 (1988) (holding that substantially justified means arguments had a reasonable basis in law and fact).

The United States' two main legal arguments below, that cattlemen cannot own water rights on federally-administered lands and the United States must, therefore, own water rights to manage those

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U.S. 120, 127 (1945)). The federal question of the application of title 28 U.S.C. § 2412 to litigation in state courts is separate and distinct from the priority dates of LU Ranching and Joyce Livestock's water rights. *Radio Station WOW*, 326 U.S. at 127. Nothing that could happen in the course of the state court's determination of the water right priority dates here would "foreclose or make unnecessary" the Supreme Court's decision on the federal question of the applicability of 28 U.S.C. § 2412 in state court. *Cox*, 420 U.S. at 480.

federal lands, run counter to established Supreme Court precedent on these issues in *United States v. New Mexico,* 438 U.S. 696, 704, 716 (1978).

While it is therefore premature to have the substantial justification component of the EAJA be a pivotal issue in this Petition, to further judicial economy, this Court's guidance on the substantial justification component of the EAJA is appropriate. *Feltner v. Columbia Pictures Television*, 521 U.S. 1151 (1997) (Court may consider additional questions to be briefed and argued where necessary).

II. The EAJA As Originally Enacted In 1980 Showed Congress' Intent That State Courts Could Award EAJA Attorney Fees.

The United States argues that this Court should infer Congressional intent and the meaning of the EAJA from the EAJA's internal references to 28 U.S.C. § 1920, a statute permitting the award of costs "only by a court of the United States."[3] The United States conspicuously fails to alert this Court,

[3] The United States refers to a Congressional hearing in support of its position, partially entitled "The Awarding of Attorneys Fees in Federal Courts." Opp. 12 (citing H.R. Rep. No. 120, 99th Cong., 1st Sess. at 5 n. 7 (1985) (citing "The Awarding of Attorneys Fees in Federal Courts: Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary," 95th Cong., 1st and 2d Sess. (1977-78))). This hearing is on the EAJA's enactment, however the references to the proposed EAJA do not contain the limiting words "in the federal courts."

however, to other EAJA references to outside statutes, such as 28 U.S.C. § 2414, that operate in Petitioners' favor. Opp. 10. Moreover, by relying so strongly on section 1920's existence, the United States overstates its importance in the EAJA scheme. Section 2412(a) only refers to section 1920 to describe "enumerated costs," that is, categories of items subject to cost reimbursements and nothing else.

Petitioners' citations to *Small v. United States*, 544 U.S. 385, 388-391 (2005) and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 578-579 (1946) in support of their argument are misplaced. In *Small*, this Court rightfully held that the "any court" phrase within 18 U.S.C. § 922(g)(1), the federal felon-in-possession-of-firearm statute, *excluded convictions entered in foreign courts*. 544 U.S. at 388-391. The "any court" phrase interpreted in *Small* is not the "any court with jurisdiction" phrase used in the EAJA and throughout the United States Code. *See* 18 U.S.C. § 922(g)(1). *Kennecott*, the other case the United States relies upon, is easily distinguishable because it interprets a state statute and relies on Eleventh Amendment immunity, not at play here. 327 U.S. at 578-579.

The EAJA as originally enacted, in 1980, proves that Congress intended that state courts award EAJA attorney fees. The 1980 EAJA made attorney fee judgments pursuant to subsections (a), (b) and (d) of section 2412 payable from state court judgments by reference to 28 U.S.C. § 2414. H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 16 (1980), reprinted in 1980

U.S.C.C.A.N. 4984. Section 2414, entitled "Payment of judgments and compromise settlements," within Chapter 161 of the United States Code entitled "United States as a party generally," provides:

> [P]ayment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury. *Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the Secretary of the Treasury after certification by the Attorney General that it is in the interest of the United States to pay the same.*

28 U.S.C. § 2414 (emphasis added).

Subsequent EAJA amendments did not alter that Congressional intent. The 1985 amendments to the EAJA deleted section 2412(d)'s reference to section 2414 and its state court final judgment provision for agency accounting and accountability purposes; the reference to section 2414 in sections 2412(a) and (b) remained intact. H.R. Rep. No. 120, 99th Cong., 1st Sess. at 19 (1985). Congress' removal of section 2414 from section 2412(d) was to make federal agencies individually accountable for their actions and decision making, and to limit federal treasury reimbursement for agency actions that were not substantially justified, and accordingly subject to

EAJA attorney fee awards. H.R. Rep. No. 1418, 96th Cong. 2d Sess. at 16 (1980). The legislative history makes no reference to a change in intent with regard to state court judgments.

III. There Is No Merit To The United States' Argument That The McCarran Amendment Precludes This Court From Awarding Attorney Fees Under The EAJA.

The United States also argues that "it would make little sense to exempt the United States for liability for costs [pursuant to the McCarran Amendment] yet subject it to liability for attorney's fees" pursuant to the EAJA. Opp. 14. In the 1985 Amendments to the EAJA Congress expressly rejected this very argument and interpretation, which the United States made at least five times in EAJA cases in the 1980's. In the 1985 EAJA Amendments, Congress stated:

> The language of Section 2412(d)(1)(a) expresses the view that prevailing parties shall be awarded attorney's fees and, when available, costs as well. This interpretation ratifies the approach taken by Four Circuits. See *Hirschey v. Federal Energy Regulatory Commission,* NO. 82-2170, at Slip Op. 5-8 (D.C. Cir., April 19, 1985); *United States v. 341.45 Acres of Land, St. Louis County, Minnesota*, 751 F.2d 924, 934 (8th Cir. 1984); *Washington Urban League v. Federal Energy Regulatory Commission*, 743 F.2d 166, 167 n.1 (3rd Cir. 1984); *United States v. 329.73*

> *Acres, Grenada and Yalobusha Counties*, 704 F.2d 800, 808 (5th Cir. 1983). Thus, the Committee rejects the interpretations of the statute by the 9th Circuit. *See Tulalip Tribes of Washington v. Federal Energy Regulatory Commission*, 749 F.2d 1367 (9th Cir. 1984).

H.R. Rep. No. 120(I), 99th Cong. at (1985).

Moreover, the United States' argument that the McCarran Amendment does not authorize an award of attorneys' fees against the United States is not the relevant inquiry. Opp. Question Presented, 13-14. Joyce Livestock and LU Ranching do not rely on the McCarran Amendment in support of their Petition. The McCarran Amendment only addresses this Court's jurisdiction over the United States for purposes of the state water rights adjudication, not the attorney fee issue. 43 U.S.C. § 666. The EAJA provides the statutory waiver of sovereign immunity for an award of attorney fees in this case. This Court has at least twice rebuffed overly technical arguments by the Government attempting to construe the McCarran Amendment in its favor, and should similarly do so here as well. *United States v. Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 7 (1993) ("We do not believe that Congress intended to create . . . a legal no-man's land in enacting the McCarran Amendment. We rejected a similarly technical argument of the Government in construing the McCarran Amendment in *United States v. District Court, County of Eagle*, 401 U.S. 520, 525 (1971)").

Finally, the United States' argument that the United States should be treated as a "private litigant" under the terms of the McCarran Amendment obviates the need for the EAJA at all, and is, accordingly, misplaced. Opp. 14. If the McCarran Amendment, enacted over twenty years before the EAJA, implies that United States should be treated exactly as a private litigant, it merely is a reflection of the American Rule for awarding attorney fees. Congress enacted the McCarran Amendment when the Courts followed the American Rule, in an entirely different legal landscape than the landscape Congress faced at the time it enacted the EAJA. Congress enacted the EAJA in the wake of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and the limitations that case imposed on attorney fee awards for citizens undertaking a private attorney general role in litigation. H.R. Rep. No. 120(I), 99th Cong. at 5 (1985). To apply the United States' interpretation of the McCarran Amendment to this EAJA issue would undercut Congress' entire intent in creating the EAJA in the first place, "to eliminate for the average person the disincentive to challenge unreasonable governmental actions." *Comm'r, I.N.S. v. Jean*, 469 U.S. 154, 163 (1990) (citing *Sullivan v. Hudson*, 490 U.S. 877, 833 (1989)).

CONCLUSION

In light of the United States' admissions in the Idaho Supreme Court that this EAJA jurisdiction

issue is important and will recur in "hundred of thousands" of water rights claims in the Western United States in which the government is involved, and the absence of solid authority in support of the government's arguments that the EAJA should not apply to state court litigation with the government, the need for this Court's review of this issue is indisputable. Indeed, Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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